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Damai Freight (M) Sdn Bhd v Affin Bank Bhd

B FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-5–02 OF 2013(B)
RAUS SHARIF PCA, ABDULL HAMID EMBONG , AHMAD MAAROP, MOHAMED APANDI ALI AND ABU SAMAH NORDIN FCJJ
7 APRIL 2015

C

Land Law — Chose in action — Assignment of — Appellant absolutely assigned rights title and interest in agreement for 30-year lease of land to bank to secure loans — Whether bank's power under loan agreement cum assignment ('LACA') to realise security by way of private sale of land unaffected by subsequent issuance of D *title to the land — Whether issuance of title did not extinguish absolute assignment or mean charge had to be created in bank's favour before it could realise security under s 256 of the National Land Code ('NLC') — Whether s 206(3) of the NLC recognised contractual operation of any transaction relating to alienated land or any interest therein*

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The question posed to the Federal Court in the instant appeal was whether a lender to whom rights to a piece of land ('the land') had been absolutely assigned — but in respect of which land a document of title was subsequently issued — could realise the security under the terms of the assignment without F resorting to remedies provided under the National Land Code ('NLC'). Pursuant to a lease agreement, the appellant was granted a 30-year lease over the land by the Selangor State Development Corporation (PKNS) to whom the land had been alienated. To secure loans from a bank, the appellant absolutely assigned its right, title and interests under the lease agreement to the G bank. The contract was formalised in a loan agreement cum assignment ('LACA'). The business and assets of the bank subsequently came to be vested in the respondent. Unknown to the respondent, title to the land was issued and registered in the name of PKNS. When the appellant defaulted in repayment of the loans, the respondent exercised its rights under the LACA and held a public H auction and sold its rights, title and interest in the lease agreement to the successful buyer. PKNS approved of the sale and was prepared to execute a deed of assignment by way of transfer of the land to the buyer. The appellant applied to the High Court to set aside the auction sale as being ultra vires the NLC and to declare that the respondent had no right to enforce the LACA and related I documents contending that once individual title to the land was issued, a legal charge over the land should have been created in the respondent's favour before foreclosure action was taken under s 256 of the NLC. The respondent, however, took the view that it was entitled to sell the land in exercise of its powers under the LACA without resorting to the NLC. The High Court

allowed the appellant's application but the Court of Appeal reversed that decision on appeal.

Held, dismissing the appeal and affirming the decision of the Court of Appeal:

(1) The issuance of title to the land did not cause the respondent to lose its security or its power of sale under the LACA. The absolute assignment under the LACA survived and the respondent had power to realise its security by way of private sale of the land. There was nothing in law that stated that once the document of title was issued, the absolute assignment was extinguished (see paras 45(a) and (c) & 33).

(2) The appellant's contractual right or benefit accruing to it under its agreement with PKNS was a chose in action. It was this right to a lease of the land which was the subject-matter of the absolute assignment under the LACA. The absolute assignment transferred the legal right to the chose in action from the appellant to the bank within the meaning of s 4(3) of the Civil Law Act 1956 ('CLA'). When the respondent exercised its power of sale under cll 9 and 11 of the LACA to dispose of its rights by way of further assignment, it only involved a transfer of the legal right to the chose in action to the purchaser. The sale of a chose in action was permissible under s 4(3) of the CLA. In the absence of any statutes or express provisions in the assignment restricting the disposal of such rights, the respondent was entitled to exercise its power of sale and to have its rights in the chose in action transferred. Such power and rights were not extinguished by reason of the issuance of the title to the land (see paras 26, 32 & 45(d)).

(3) The creation of a charge was not a pre-requisite before the respondent could proceed with recovery action against the appellant under the LACA. Nor was there any requirement under the NLC for the title to the land to vest in the appellant and then for a charge to be executed before the respondent could realise the security by way of foreclosure action under s 256 of the NLC. The respondent's recovery action stood independently. Section 206(3) of the NLC recognised the contractual operation of any transaction relating to alienated land or any interest therein and there was no reason why it could not similarly give effect to the contractual obligations and rights of the parties as they had determined under the LACA (see paras 31, 41 & 45 (e) and (f)).

[Bahasa Malaysia summary

Soalan yang dikemukakan kepada Mahkamah Persekutuan dalam rayuan ini adalah sama ada pemberi pinjaman kepada siapa hak kepada sebidang tanah ('tanah tersebut') telah diserahakkan secara mutlak — tetapi berkaitan tanah yang mana dokumen hakmilik kemudiannya dikeluarkan — boleh merealisasi sekuriti di bawah terma-terma penyerahan hak tanpa menggunakan

remedi-remedi yang diperuntukkan di bawah Kanun Tanah Negara ('KTN'). Berikutan perjanjian pajakan, perayu diberikan pajakan 30 tahun ke atas tanah oleh Perbadanan Kemajuan Negeri Selangor kepada siapa tanah tersebut diserahhakkan. Untuk menjamin pinjaman daripada bank, perayu menyerahkan haknya secara mutlak, hakmilik dan kepentingan di bawah perjanjian pajakan kepada bank. Kontrak dilaksanakan dalam perjanjian pinjaman merangkap tugasan ('PPMT'). Perniagaan dan aset bank kemudiannya menjadi terletak hak kepada responden. Tidak diketahui oleh responden, hakmilik kepada tanah dikeluarkan dan didaftarkan atas nama PKNS. Apabila perayu mengingkari bayaran balik pinjaman, responden menguatkuasakan haknya di bawah PPMT dan mengadakan lelongan awam dan menjual haknya, hakmilik dan kepentingan dalam perjanjian pajakan kepada pembeli yang berjaya. PKNS meluluskan jualan tersebut dan bersedia untuk melaksanakan surat ikatan penyerahakan melalui pindahan tanah tersebut kepada pembeli. Perayu memohon kepada Mahkamah Tinggi untuk mengetepikan jualan lelongan sebagai ultra vires KTN dan untuk mengisytiharkan bahawa responden tidak mempunyai hak untuk menguatkuasakan PPMT tersebut dan dokumen berkaitan berhujah bahawa apabila hakmilik persendirian kepada tanah tersebut dikeluarkan, caj sah ke atas tanah patut dibentuk memihak responden sebelum tindakan gadai janji dilaksanakan di bawah s 256 KTN. Responden, walau bagaimanapun, berpandangan bahawa ia berhak untuk menjual tanah tersebut dalam melaksanakan kuasanya di bawah PPMT tanpa merujuk kepada KTN. Mahkamah Tinggi membenarkan permohonan perayu tetapi Mahkamah Rayuan mengakaskan keputusan tersebut atas rayuan.

Diputuskan, menolak rayuan dan mengesahkan keputusan Mahkamah Rayuan:

(1) Pengeluaran hakmilik kepada tanah tersebut tidak menyebabkan responden untuk hilang jaminannya atau kuasa jualannya di bawah PPMT. Penyerahakan mutlak di bawah PPMT berterusan dan responden mempunyai kuasa untuk merealisasikan jaminannya melalui jualan peribadi tanah tersebut. Tidak terdapat apa-apa dari segi undang-undang yang menyatakan bahawa apabila dokumen hakmilik dikeluarkan, penyerahhakkan mutlak dilunaskan (lihat perenggan 45(b) dan (c) & 33).

(2) Hak atau faedah kontraktual perayu terakru kepadanya di bawah perjanjiannya dengan PKNS adalah hak dalam tindakan. Ia adalah hak ini kepada pajakan terhadap tanah tersebut yang mana adalah perkara penyerahhakkan mutlak di bawah PPMT. Penyerahhakkan mutlak memindahkan hak sah kepada yang dipilih dalam tindakan daripada perayu kepada bank dalam maksud s 4(3) Akta Undang-Undang Sivil 1956 ('AUS'). Apabila responden melaksanakan kuasa jualannya di bawah klausa 9 dan 11 PPMT untuk melepaskan haknya melalui

penyerahakan selanjutnya, ia hanya melibatkan pindahan hak sah kepada hak dalam tindakan kepada pembeli. Jualan hak dalam tindakan adalah dibenarkan di bawah s 4(3) AUS. Dalam ketiadaan apa-apa statut atau peruntukan nyata dalam penyerahhakkan menghadkan perlepasan hak sedemikian, responden berhak untuk menjalankan kuasa jualannya dan untuk haknya dalam tindakan dipindahkan. Kuasa dan hak sedemikian tidak dilenyapkan atas alasan pengeluaran hakmilik kepada tanah tersebut (lihat perenggan 26, 32 & 45(d)).

(3) Pembentukan gadaian adalah bukan pra-syarat sebelum responden dapat meneruskan dengan tindakan mendapatkan semula terhadap perayu di bawah PPMT. Juga tidak terdapat apa-apa keperluan di bawah KTN untuk hakmilik kepada tanah untuk meletakhakkan di dalam perayu dan kemudiannya untuk gadaian dilaksanakan sebelum responden dapat merealisasikan jaminan melalui tindakan gadai janji di bawah s 256 KTN. Tindakan mendapatkan semula responden berdiri secara bebas. Seksyen 206(3) KTN menerima operasi kontraktual apa-apa transaksi berkaitan kepada tanah yang diserahkan atau apa-apa kepentingan di dalamnya dan tidak terdapat alasan mengapa ia dapat dengan cara sama memberi kesan kepada tanggunjawab kontraktual dan hak pihak-pihak kerana ia menentukan di bawah PPMT (lihat perenggan 31, 41 & 45(e) dan (f)).]

Notes

For cases on assignment of, see 8(3) *Mallal's Digest* (5th Ed, 2015) paras 3117–3119

Cases referred to

Chuah Eng Khong v Malayan Banking Bhd [1998] 3 MLJ 97, FC ; (refd)
Phileoallied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor [2002] 2 MLJ 513, FC (refd)
Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd [1989] 2 MLJ 149, SC) (refd)
Hong Leong Bank Bhd v Goh Sin Khai [2005] 3 MLJ 154, HC (folld)
Jashin Scaffolding (M) Sdn Bhd v Chew Ai Eng Sdn Bhd; OCBC Bank (Malaysia) Bhd [2004] 6 CLJ 497, HC (refd)
Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd [1984] 2 MLJ 268), FC (refd)
Ooi Chin Nee v Citibank Bhd [2003] 1 CLJ 548, HC (refd)

Legislation referred to

Civil Law Act 1956 s 4(3)
National Land Code ss 206(1), 206(3), 207, 208, 209, 210, 211, 212, 256, 257, 292
Registration of Titles Regulation ss 4, 41

A Rules of Court 2012 O 31, O 83
Strata Titles Act 1985 ss 5(1), (2), 16(6), 34(1)(a)

Appeal from: Civil Appeal No B-02–3022–2010 (Court of Appeal, Putrajaya)

B *Meyappan Pillai (George Proctor and Stanislaus with him) (Messrs YS Woo & Proctor) for the appellant.*
Yoong Sin Min (KS Lau and Violet Liang with her) (Messrs Shook Lin & Bok) for the respondent.

C **Abdull Hamid Embong FCJ:**

JUDGMENT OF THE COURT

[1] The subject matter of the present appeal concerns a piece of land known
D as Lot No 2, Jalan Lingkaran 1, Fasa 11A, Bhg 2, Peringkat 1, Kawasan Perusahaan Selat Kelang, Pelabuhan Kelang, Selangor ('the Land') which was to be alienated by the State Government of Selangor to Perbandaran Kemajuan Negeri Selangor ('PKNS').

E **[2]** Pending the issue of a document of title to the land, PKNS entered into an agreement to lease dated 28 November 1988 ('the principal agreement') with the appellant thereby granting a lease over the Land to the appellant for a period of thirty years commencing from 28 December 1988 and expiring on 28 December 2018 ('the lease').
F

[3] In 1990, the appellant obtained loans of RM1.2m and RM750,000 from Bank Buruh (M) Berhad ('BBMB').

G **[4]** As security for the repayment of the loans, a loan agreement cum assignment dated 16 April 1990 ('LACA') was executed by the appellant thereby assigning absolutely all its rights, title and interest under the principal agreement in favour of BBMB.

H **[5]** On 11 March 1995, BBMB changed its name to BSN Commercial Bank (M) Berhad and its business and assets were subsequently transferred to and vested into the respondent ('the bank') pursuant to a vesting order dated 18 December 2000.

I **[6]** In 2003, unknown to the bank, title to the land was issued and registered in the name of PKNS.

[7] At about the same time, the appellant defaulted in its payment obligations under the said loans and became indebted to the bank in the total

sum of RM1,311,631.48 as at 30 September 2003 with interest thereon from 1 October 2003 to date of full settlement. A judgment on that debt was obtained against the appellant on 26 February 2004.

[8] In the circumstances, the bank in exercise of its rights under the LACA conducted a public auction on 28 December 2005 and sold its rights, title and interest under the principal agreement to one Asia Route (M) Sdn Bhd ('the purchaser'), who was the only bidder, at the reserved price of RM1.8m.

[9] Since, by then, the land had been already registered in the name of PKNS, the bank informed PKNS of the same. By letter dated 19 April 2006, PKNS gave its approval to the bank's aforesaid sale and was prepared to sign its consent to the purchaser, provided that the deed of assignment by way of transfer was forwarded to PKNS.

[10] On the same day ie on 19 April 2006, the appellant filed the originating summons in the High Court seeking, inter alia, the following reliefs against the bank:

(a) a declaration that the bank had no right to enforce the loan agreements, the LACA and the power of attorney concerned;

(b) an order and declaration that the sale by the bank was ultra vires the National Land Code 1965; and

(c) an order that the auction sale on 28 December 2005 to be set aside.

[11] It was the appellant's case that once the individual title was issued, the bank could not sell its rights to the land under the principal agreement and the LACA, but must first execute a legal charge over the title and effect a sale pursuant to the National Land Code 1965 ('NLC').

[12] The bank, however, took the position that it was fully entitled to exercise its powers under the LACA and sell its rights under the principal agreement and to the land by way of a further assignment, without resorting to the statutory remedy route ie having to create a charge and subsequent to that, to file a foreclosure action, as provided under the NLC.

[13] On 27 September 2010, the appellant's application was allowed by the High Court. The High Court relied primarily on previous High Courts' decisions of *Ooi Chin Nee v Citibank Bhd* [2003] 1 CLJ 548; *Jashin Scaffolding (M) Sdn Bhd v Chew Ai Eng Sdn Bhd; OCBC Bank (M) Bhd* [2004] 6 CLJ 497

[14] On 8 February 2012, the Court of Appeal allowed the bank's appeal and set aside the High Court's order of 27 September 2010.

THE QUESTION

[15] The appellant applied to this court for leave to appeal against the decision of the Court of Appeal, which was granted on 8 January 2013 on the following sole question of law:

> Whether a lender having an absolute assignment of rights to land may realize his security under the terms of the assignment, where document of title to the land was issued subsequently, without the need to resort to the remedies provided under the National Land Code, 1965.

THE SUBMISSIONS

[16] It was argued for the appellant that the principles set out in the cases of *Ooi Chin Nee* and *Jashin Scaffolding (M) Sdn Bhd* which were relied upon by the High Court in allowing the appellant's application, remain good law. It was argued that the two cases above supported the appellant's contention that where the issue document of title to the land had been issued, the bank has to create the proposed charge first before foreclosure proceedings could be filed. It follows that an order for sale must be obtained pursuant to O 31 and 83 of the Rules of Court 2012 and/or s 256 of the NLC before the land could be auctioned. Thus, the bank cannot unilaterally seek a sale by itself.

[17] Learned counsel for the appellant further contended that the Court of Appeal, in rejecting the principles propounded in *Ooi Chin Nee* and *Jashin Scaffolding (M) Sdn Bhd*, had in effect extended the principle enunciated by the *Phileoallied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor* [2002] 2 MLJ 513 which recognised the power of the bank to auction off property in a situation where no title had been issued, to one where title has been issued.

[18] Learned counsel for the appellant also urged the court to look into public policy considerations that if there is a power to sell privately any property with title, without the order of the court, then the provisions of ss 256, 257 and the Rules of Court would be rendered redundant at the option of financial institutions. The protection of the court envisaged under a judicial sale would then be rendered nugatory.

[19] Learned counsel for the bank submitted that in the present case, it cannot be disputed that the assignment granted by the appellant in favour of the bank under the LACA was an absolute one (not purporting to be by way of charge only) within the meaning of s 4(3) of the Civil Law Act 1956 . In this regard, she referred to cl 7(1) of the LACA which provides:

> For the consideration aforesaid, the borrower hereby absolutely assigns to the bank the lease of the said land and the full and entire benefit of the principal agreement together with the rights, titles and interest of the borrower therein.

[20] It was also submitted that it is settled law that an absolute assignment creates an equitable mortgage. In support of that proposition, he cited the case of *Chuah Eng Khong v Malayan Banking Bhd* [1998] 3 MLJ 97. *Bupinder Singh* was cited in support of his contention that in the absence of any statutory provisions or common law requiring the equitable mortgagee to obtain a court order to realise its security under an absolute assignment of rights to land, the court should give effect to and recognise the contractual rights as determined between the parties.

[21] Learned counsel for the bank also argued that in enforcing its rights for recovery against the appellant, the bank did not sell the land per se. What the bank sold was its rights and title under the LACA and the principal agreement, namely its rights to a lease to the land. In other words, the bank sold its 'chose in action' that has been transferred from the appellant through an absolute assignment under s 4(3) of the Civil Law Act 1956.

[22] It was further submitted that as an equitable mortgagee, the power of the bank to exercise its rights to sell the land was not affected by the fact that the title to the land has been issued. In this respect, she relied on the terms of the LACA, particularly cll 9, 11, 25(1) and 25(2) and argued that these clauses merely confer contractual rights or privileges to the bank over the land. She further contended that it is not obligatory or mandatory for the bank, pursuant to these clauses, to create a charge on the land before commencing its recovery action.

THE ABSOLUTE ASSIGNMENT: ITS LEGAL EFFECT

[23] The law on assignment is governed by s 4(3) of the Civil Law Act 1956, which reads as follows:

> *Any absolute assignment* by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, *shall be*, and *be deemed to have been, effectual in law*, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, *to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor* (Emphasis added.)

A 'chose in action' is legally defined as 'a thing of which a person has not the present enjoyment, but merely a right to recover it (if withheld) by action' (see *Mozley & Whiteley's Law Dictionary* (10th Ed). Essentially, it is a personal right to sue ie a right to enforce payment of a debt by legal proceedings or to sue for damages for contract.

[24] Whether or not an assignment is an absolute one not purporting to be by way of charge or security only is to be gathered only from the four corners of the instrument itself and all the terms of the instrument must be considered (see *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268).

[25] In the present case, the assignment document is the LACA, in which cl 7(1) therein states that the appellant, as the borrower, 'absolutely assigns to the bank the lease of the said land and the full and entire benefit of the principal agreement together with the rights, title and interest of the borrower therein'. In this regard, the use of the words 'absolutely assigns' in the provision of the LACA clearly demonstrates that the instrument was intended by the parties to be an absolute assignment and not one by way of charge only (see *Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd* [1989] 2 MLJ 149). The law in relation to absolute assignment is clear. An absolute assignment is an equitable mortgage and the essence of a mortgage is that there is a transfer of the ownership of a chose in action, not the land, to the mortgagee (see *Bupinder Singh* and *Chuah Eng Khong*). It must be remembered that the individual title of the land is registered in the name of PKNS as its registered proprietor.

[26] Now, the principal agreement mentioned in the assignment is the agreement between PKNS and the appellant for a lease over the land for a period of thirty years. In this regard, the appellant has only a right in personam, that is the contractual right or benefit accruing to it under the said principal agreement. That right is a chose in action which is enforceable by action if it is unlawfully withheld by PKNS. It is this right to a lease to the land that becomes the subject matter of the absolute assignment between the appellant and the bank under the LACA. The absolute assignment, therefore, is in relation to a transfer of the legal right of the chose in action from the appellant to the bank as assigned therein within the meaning of s 4(3) of the Civil Law Act. It follows that when the bank exercised its power of sale under the LACA to dispose of its rights by way of a further assignment, it only involves a transfer of a legal right to the chose in action to the purchaser. In the absence of any statutes or express provisions in the assignment restricting the disposal of such rights, the bank is entitled to exercise its powers of sale and to have its rights to the chose in action transferred. Such powers and rights, in our view, are not extinguished by reason of the issuance of the issue document of title to the land.

[27] The appellant contended that the ratio in *Bhupinder Singh*'s case on the enforcement of the sale rights has been restricted to situations where no title has been issued. It was argued that since in this case, the document of title to the land had been issued, the proper and correct procedure is therefore to execute a charge and to obtain the order of the court for the sale of the land pursuant to O 83 Rules of Court 2012 and s 256 of the NLC.

[28] The case of *Bhupinder Singh* involves a situation where there is no issue document of title and as such it is not an authority for the proposition that an assignee loses the power of sale that he has, once the issue document of title to a land has been issued. On the facts, we say that *Bhupinder Singh* is not applicable in the present case which is to determine whether the bank as an absolute assignee has lost its power of sale under the LACA in a situation where title over the secured land has been issued. In any event, this court in *Bhupinder Singh* decided that 'in the absence of any statutory provisions or common law requiring the equitable mortgagee to obtain a court order to realise its security under an absolute assignment of rights to land, the court should give effect to and recognise the contractual rights as determined between the vendor and the purchaser.'

THE CONTRACTUAL OBLIGATIONS UNDER THE LACA

[29] In view of the fact that the document of title has been issued in this case, it is pertinent therefore to examine the provisions governing the contractual obligations of the parties in respect of the creation of a charge under the LACA. Clauses 25(1) and (2) of the LACA reads:

> The Borrower covenants with the bank as follows:-
>
> (1) *If required by the Bank* the Borrower shall simultaneously upon execution of this LACA execute a first legal charge in escrow in favour of the Bank in form and substance acceptable to the Bank to be left in the custody of the Bank with power and authority for the Bank to cause and present the said Charge for registration upon the issue of the separate document of individual title in respect of the said Land
>
> (2) Upon issue of a separate document of individual title to the said Land by the Government the Borrower shall at his own cost and expenses *and upon being so required to do by notice in writing from the Bank* take transfer of and execute a charge over the separate document of individual title to the Lease of the said Land such charge to be in the Bank's standard form (with such variations thereof as the Bank may require) in favour of the Bank to secure the repayment to the Bank of the balance of the Loan then due and all other moneys together with the interest thereon at the prescribed rate payable and owing by the Borrower to the Bank under and by virtue of this Agreement at the date of the execution of the Charge. (Emphasis added.)

[30] On the plain reading of these two clauses, we agree with the submission of learned counsel for the bank that these clauses only confer contractual rights or privileges to the bank in terms of the execution of a charge upon the issuance of the separate document of individual title in respect of the land. In our considered view, the bank is not, however, obliged to ensure the execution of the charge and thereafter to obtain an order for judicial sale before it could

proceed to exercise its rights under the LACA upon the appellant's default under the loan. The underlined phrases in both sub-cl above are manifestations of these rights of the bank.

[31] The creation of a charge is not however a prerequisite for the bank before it could proceed with the recovery action against the appellant under the LACA despite the issuance of the issue document of title. Similarly, there is also no requirement under the NLC for the title to vest in the appellant and then for a charge to be executed before the security created in relation to the land can be realised by the bank. In other words, the bank does not lose its power of sale over its rights to the land merely by reason that the issue document of title to the land has been issued.

[32] It should be noted that the entitlement and power of the bank to exercise its rights to sell the lease over the land in the event of the appellant's default are clearly provided for under cll 9 and 11 of the LACA. Clause 9 sets out the events of default upon which the bank is entitled to recover the sums of money owed under the LACA and to exercise the rights and powers provided thereunder by law without any previous notice to or concurrence on the part of the appellant. Meanwhile, cl 11 provides for the power of the bank, upon the events of default referred to under cl 9, which includes the right and power to sell and assign the lease of the said land as the absolute unencumbered owner thereof at such price and in such manner as the bank shall in its absolute discretion think fit. In our view, it is therefore untenable to deprive the bank from enforcing its rights and powers as provided to it under cll 9 and 11 of the LACA merely by reason of the issue of the document of title to the land. In the absence of any statutory provision or any express bar in the assignment to that effect, the bank is entitled and cannot to be prohibited from exercising its power and rights as stipulated under cl 9 and 11 of the LACA.

[33] In addition, we are unable to agree with the view of the appellant that since the document of title to the land has been issued, the bank has to create the proposed charge first before it could proceed with the foreclosure proceedings. This seems to suggest that in a situation where the issue document of title to a land has been issued, an absolute assignment must first be extinguished before the assignee could foreclose the land. We do not think this is the correct proposition of the law. There is nothing in law which says that once document of title is issued, the absolute assignment is extinguished. On this point, we agree and cite with approval these passages from the judgment of the High Court in *Hong Leong Bank Bhd v Goh Sin Khai* [2005] 3 MLJ 154 which held as follows:

> There is no statute or rule in common law that once an individual title or strata title is issued, the absolute assignment is extinguished. Likewise, there is nothing to say that the assignee must extinguish the assignment by ensuring the assignor takes a

transfer of the property and creates a charge in favour of the lender In the absence of any statutory provision or rule of common law, the court must give effect to the intention of the parties that is reflected in the contractual provisions of the assignment. This is plain from the judgment of Abdul Malek Ahmad FCJ in *Phileoallied* where his Lordship said that in such cases 'the court should give effect to and recognise the contractual rights'.

Unless the contractual provisions in the assignment provide that it is extinguished upon the issuance of an individual or strata title, the assignment is not extinguished. Unless the assignment imposes an obligation on the assignee to ensure that title is transferred to the assignor and a charge is registered, the court cannot impose such an obligation on the assignee in the absence of statutory power or common law enabling the court to do so....

[34] It is to be noted that in *Goh Sin Khai*, the High Court was asked to determine on a similar issue as to whether a lender having an assignment, may realise his security when there is an issue document of title to the property, without creating a charge and obtaining an order of sale from the court. The High Court answered the question in the affirmative and disagreed with the reasoning and observations made in *Ooi Chin Nee* and *Jashin Scaffolding (M) Sdn Bhd* which held the opposite view.

[35] In *Goh Sin Khai*, the learned High Court judge had critically examined the reasoning made by the learned judges of the High Court in *Ooi Chin Nee and Jashin Scaffolding (M) Sdn Bhd* in arriving at their decisions on the issue. His Lordship had discussed in great length as to why, in his view, the decisions of the High Court in those two cases were wrong. The learned judge's correct observations can be gleaned from the following passages of his judgment which says:

.... The learned judge agreed with the purchaser and held that once strata title is issued, the property must be transferred to the purchaser and the financier must register a National Land Code charge and thereafter apply to court for an order for sale. The learned judge in purported support of his conclusion referred to both the statutory provisions and the contractual provisions. The statutory provisions referred to was ss 5(1), (2), 16(6), 34(1)(a) of the Strata Titles Act 1985 ('the Act') and ss 89 to 91 of the National Land Code 1965 ('the Code').

Though the sections from the two statutes relied upon by the learned judge range from the application of the Code to subdivided property to the issuance of individual title to the proprietor, with the utmost of respect, to my mind it is not supportive of the conclusion that once individual title is issued in the developers name, it must be transferred to the assignor and a charge registered in favour of the assignee.

It is clear that the learned judge's reasoning in *Ooi Chin Nee*'s case was premised by his equation of the absolute assignment therein to an equitable charge, and equating an equitable charge to an equitable mortgage, when in essence there is a marked difference between an equitable mortgage and an equitable charge.

The learned judge to my mind based on the documents therein (ie the sale and purchase agreement, the deed of assignment and the individual title) must have concluded that the absolute assignment ceased to exist once the individual title had been issue.

That must be so because the absolute assignment, as the Federal Court has decided in Phileoallied, creates an equitable mortgage. Surely, both an equitable mortgage and an equitable charge cannot co-exist based on the instrument creating an absolute assignment since both mortgage and charge are in essence quite different. Since the assignment creates an equitable mortgage, in order for an equitable charge to have come into existence when an individual title was issued, the assignment must have been extinguished. This leads to a dangerous state of affair that can have far-reaching implications on the banking sector. If the assignment is extinguished by the mere fact that a strata title has been issued, the assignor would be in a position to deal with the property and the financier's security is at risk. There is no basis in law to my mind for concluding that the issuance of an individual title has the effect of converting the existing equitable mortgage into an equitable charge. The equitable mortgage and the absolute assignment continue to subsist even after the issuance of an individual title.

[36] The case of *Ooi Chin Nee* was referred and followed by *Jashin Scaffolding (M) Sdn Bhd* but on a different ground. In respect of J*ashin Scaffolding (M) Sdn Bhd*, the learned judge in *Goh Sin Khai* made the following observations:

The learned judge also correctly held that the purchaser in those circumstances could seek the equitable remedy of specific performance against the developer pursuant to his contractual rights under the sale and purchase agreement. The learned judge's reasoning unfortunately stops short of distinguishing between cases where the chose in action has not been absolutely assigned to another and cases where it has been so assigned. For in the former case, the purchaser is still vested with the chose, which are the rights accruing to him under the sale and purchase contract and as such, could seek the relief of specific performance to compel the transfer of the property to him. But in the latter, the legal right to the chose in action has been absolutely transferred to the assignee and the only way in which the purchaser could possibly take a transfer from the developer is if the assignee reassigns the chose to the purchaser. It follows that when the assignee exercises the power of sale to dispose of the chose, it clearly falls outside the ambit of a 'dealing' with or in respect of land within the meaning assigned to that term by the Code. The disposal of the chose by another assignment merely amounts to the transfer of the legal right to it to another, and the purchaser gains the contractual right to enforce against the developer the transfer of the property to him through a decree of specific performance.

Likewise, if a purchaser buys a property from a developer without any financing and prior to the issuance of an individual title, contracts to sell the property to another, the first purchaser will have to execute an assignment in favour of the second purchaser. That assignment cannot by any stretch of imagination be termed a 'dealing' with or in respect of land within the meaning of the Code. It only serves to transfer and vest in the second purchaser the rights and interest of the first purchaser under the sale and purchase agreement with the developer. Simply put, the

assignment serves to transfer the legal right to the chose from the first purchaser to the second purchaser. The second purchaser acquires, as a result of the assignment, the contractual rights of the purchaser under the original sale and purchase agreement with the developer, which he can then enforce against the developer by a decree of specific performance to compel the transfer of the property to him when an individual title is issued. It cannot be gainsaid that the same must be the case when an assignee exercises the power of sale to dispose of the legal right to the chose in action. The issuance of an individual title registered in the developer's name prior to the assignee disposing the chose does not restrict or eradicate the assignee's right to transfer the chose.

Consequently to my mind there is nothing in s 292 of the National Land Code that supports the proposition that once an individual title has been issued an assignee cannot exercise his power of sale and transfer the chose in action under the original sale and purchase agreement to another.

[37] The learned judge's observations on the reasoning made in the above two cases and his explanations that followed were very extensive to which, we feel, need no further elaboration here. Suffice to say that on the perusal of the judgment in *Goh Sin Khai*, we fully agree with the reasons given by the learned judge in that case and in disagreeing with the reasoning in *Ooi Chin Nee* and *Jashin Sacffolding (M) Sdn Bhd*. We also do not see any necessity for us to add, minus or expand on the reasons given by the said learned judge in that respect, save to say that they are the correct exposition of the law in respect of an absolute assignment.

[38] In the course of the submission, learned counsel for the bank also urged the court to look into the historical development of our land laws to which, she argued, is consistent with the practice of transferring interests in land by way of assignments. In this regard, referrals were made to some of the earlier legislations relating to land laws in our country, first, by giving an example of the Selangor Registration of Titles Regulation 1891 which contained therein the provisions specifically prohibiting the dealing, transfer, mortgage and charge of land except in accordance with the relevant provisions made under the Regulation (which among others required the execution of a charge in the prescribed form and to be duly registered) (See ss 4 and 41 of the Regulation). It was further argued that the Federated Malay States Registration of Titles Enactment of 1911 and Land Code of 1926 which were enacted and came into force later also adopted and contained similar provisions to that effect.

[39] Learned counsel for the bank submitted that our present NLC which was enacted in 1965 for the first time as a uniform code of land law for the states in Peninsular Malaya however does not adopt all the provisions similar to those contained in the earlier legislations which prohibited the contractual operation involving rights relating to land or any interests therein save in accordance to the provisions made thereunder. In contrast, our present NLC

recognises the contractual operation relating to land as envisaged under s 206(3) of the NLC, apart from the other dealings mentioned under s 206(1) which requires the compliance of instrument in accordance with ss 207 to 212 and registration under Part Eighteen of the NLC. Section 206 of the NLC reads:

> (1) Subject to the following provisions of this section –
>
> (a) every dealing under this Act shall be effected by an instrument complying with the requirements of sections 207 to 212; and
>
> (b) no instrument effecting any such dealing shall operate to transfer the title to any alienated land or, as the case may be, to create, transfer or otherwise affect any interest therein, until it has been registered under Part Eighteen.
>
> (2) The provisions of subsection (1) shall not apply to –
>
> (a) the creation of, or other dealings affecting, tenancies exempt from registration (which may be effected, instead, as mentioned in subsection (2) of section 213); or
>
> (b) the creation of liens (which may be created, instead, as mentioned in section 281).
>
> (3) Nothing in subsection (1) shall affect the contractual operation of any transaction relating to alienated land or any interest therein.

[40] In light of the above, learned counsel for the bank submitted that the LACA or assignment sale by the bank in this case is thus a contractual operation which is recognised by the NLC. Further, it was argued that there is nothing under the NLC or any law which prohibits the contractual operation of an absolute assignment of rights to land, including the assignee's sale of a chose of action by way of public auction without resorting to the remedies provided under the NLC, although the document of title to the land has been issued at the time of the sale. In addition, it was also reiterated that there is no requirement under the NLC for the title to vest in the appellant and then for a charge to be executed before the security created in relation to the land can be realised by the bank.

[41] We agree with this contention. Section 206 (3) of the NLC, by providing a liberal application of equity, recognises the contractual operation of any transaction relating to alienated land or any interest therein. In this regard, we see no reason as to why a similar recognition could not be accorded to the bank in exercising its power of sale over the land in accordance with the contractual provisions under the LACA. As discussed earlier, in the absence of any express provision in the statutes or the contractual provision governing the rights between the parties to the contrary, we are of the view that the bank is therefore entitled to exercise its power of sale under the LACA and to transfer

the chose in action under the principal agreement to the purchaser by way of a further assignment. In addition, the facts that there was no charge created upon the issuance of the issue document of title to the land and no order for a judicial sale has been obtained by the bank do not prevent the bank from enforcing its rights under the LACA to proceed with the recovery action upon the default by the appellant.

[42] At the close of submissions, learned counsel for the bank brought to our attention the importance of this case from the perspective of the banking and financial sectors in their loan transactions with borrowers. She mentioned the following common practices:

(a) it is very common for a borrower to approach a bank for a loan to buy land or property on which no title has been issued yet. If there was individual title already, the bank would obtain a NLC charge over the title as security for the loan;

(b) but where there is no title to the land, banks take what is commonly known as an assignment of the land. Such assignment is really an absolute assignment by the borrower (assignor) to the bank (assignee) of the borrower's bundle of rights, title and interests under his sale and purchase agreement with the seller (developer);

(c) such bundle of rights so assigned would include a right to be transferred the individual title when it is issued;

(d) the borrower's assignment (known as the loan agreement cum assignment or LACA, as in our case, or a deed of assignment) is usually consented to by the developer or seller of the land. Such consent would incorporate the seller or developer's agreement to transfer the eventual title to the bank or its nominee, once the title is issued;

(e) if the borrower defaults under the loan, and no title to the land has been issued as yet, the bank may effect a sale of the land by way of a further assignment of the bundle of rights already given to and owned by the bank (by way of the borrower's assignment) such that the bank then assigns this bundle of rights to the purchaser; and

(f) the purchaser will then arrange with the original seller/developer for the transfer of the title directly to him, once title is issued.

[43] Learned counsel then submitted that in this case, the title deed came out mid-way. If, as the appellant contends, the bank cannot effect an assignment sale but have to create a charge over the title first and then apply for an order for sale under the NLC, clearly the time and costs involved would be to the detriment of both:

A (a) the bank, because the recovery efforts would be hugely delayed and would require the borrower/chargor to cooperate, as he has to execute the charge; and

(b) the borrower, as the passage of time will result in more interest accruing on the loan and the cost of the creation of the charge and foreclosure proceedings will be passed on to him.

B

[44] We agree with that point of view as submitted.

C **[45]** In conclusion, we make the following summary of our findings:

(a) the LACA, has created an absolute assignment not one by way of charge only. This means that the bank should have all the rights, title and interest of the assignor/appellant under the principal agreement;

D (b) when title was issued to the land, the bank did not lose its security or its power of sale under the LACA. The absolute assignment under the LACA survives;

(c) the bank is thus empowered to realise its security for the loans by way of a private sale of the land;

E

(d) the purchaser merely takes a legal right of the chose in action that was assigned to the bank. The sale of a chose in action is permissible under s 4(3) of the Civil Law Act 1956;

F (e) there is no necessity to first create a charge or for the bank to resort to the statutory remedy of a foreclosure action under s 256 of the NLC, to realise its security. The bank's recovery action stands independently;

(f) section 206 (3) of the NLC allows such a transaction relating to any alienated land to give effect to the contractual obligations and rights of the parties as they had determined under the LACA.

G

[46] For these reasons, we therefore answer the question of law posed in the affirmative and affirm the order of the Court of Appeal in reversing the decision of the High Court. In the premises, this appeal is dismissed with costs.

H

Appeal dismissed and decision of the COA affirmed.

Reported by Ashok Kumar

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